No. 06-1190

In The
Supreme Court of the United States

AMY G. and G.G.,

Petitioners,

v.

M.W.,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Three

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the decision below rest on an adequate and independent state ground, namely, that under California law a stepmother cannot displace a natural mother, who promptly asserts her rights, as the mother of a child?

2. Where a woman conceives, bears, and nurses a child, and promptly asserts her parental rights to him after the child is taken by the father, and where California law provides that proof of giving birth establishes the woman as the mother (California Family Code § 7610(a)), does a California court's refusal to allow a stepmother to challenge that rule through use of statutory presumptions concerning paternity violate Equal Protection?

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JURISDICTION

Petitioners claim this Court has jurisdiction under 28 U.S.C. § 1257(a) (state statute repugnant to the Constitution), and claim a violation of the Equal Protection Clause, but they do not clearly identify which state statute is constitutionally infirm. Petition, p. 1. However, this Court does not have jurisdiction because the decision of the California Court of Appeal is fully defensible on the basis of an independent state ground, namely, that unless a child has been abandoned by its mother, or is the child of a lesbian relationship, California law recognizes only one mother, who cannot by California State law be Petitioner Amy G., a stepmother. California Family Code § 7610(a); *Johnson v. Calvert*, 5 Cal.4th 84, 92 n.8 (1993).

COUNTER STATEMENT OF THE CASE

M.W. (hereafter "Kim") and Petitioner G.G. (hereafter "G.G.") conceived a child, Nathan. Both Kim and G.G. were married to other people at the time of Nathan's conception and birth. G.G. is married to Petitioner Amy G. (hereafter "Amy"). *Amy G. v. M.W.*, 142 Cal.App.4th 1, 4 (2006) (hereafter "*Amy G.*"), Pet. App. 3a.

Nathan is not a "child of the marriage" between his father and stepmother Amy, as alleged in the Petition at page 1.[1] Nathan is a child born to Kim, his biological

[1] "Children of the marriage" include the parties' natural and adopted children, but ***not*** stepchildren. Family Code, § 2010(b); *In Re Marriage of Lewis & Goetz*, 203 Cal.App.3d 514 (1988); *see also Miller v. Miller*, 64 Cal.App.4th 111 (1998), *cert. denied*, 525 U.S. 1122 (1999) (*rejecting* stepfather's claim that he achieved "presumed father" status

(Continued on following page)

mother. As the Court of Appeal stated, "[t]he essential facts, including Kim's status as Nathan's biological mother, father's biological paternity, and Amy's status as father's spouse, are undisputed." *Amy G., supra,* Pet. App. 8a.

It is undisputed that after Nathan's birth, Kim nursed him for a month, and followed him from Virginia to California twenty-four hours after his father took him to that state. (2App. Tab 2, 102-108; 2App. Tab 4, 109, *et seq.*)[2] Within several months of returning to California, Kim sought legal redress for the wrongful taking of Nathan by G.G. Kim filed a petition for maternity, and shortly thereafter filed an order to show cause for custody. *Amy G., supra,* Pet. App. 4a. Thus, as the Court of Appeal noted, Kim acted promptly to obtain custody of her son. *Amy G., supra,* Pet. App. 16a.

The trial court denied G.G.'s oral and written motions to be joined in Kim's motion for custody, Pet. App. 4a, ruling that Kim was Nathan's biological mother, and to give stepmother Amy standing would reward G.G. and Amy for withholding the child from his mother. (Opp.App. 0010, lines 11-21.)[3] The Court of Appeal affirmed. *Amy G., supra*, Pet. App. 21a.

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under Code § 7611(d) "receiving a child into his home," because he cohabited with mother and she had custody of child half the time).

[2] This Opposition cites to the one-volume record on the direct appeal in the California Court of Appeal as "App." the seven-volume record on the writ proceeding in the Court of Appeal by volume number, *e.g.*, "2App." (Petitioners' Appendix), and to Kim's Appendix to the writ proceeding as "Opp.App."

[3] There is evidence from the trial court proceedings that G.G., who had two daughters with his wife, Amy, but whose Eastern Indian culture prizes male progeny, schemed to remove Kim's male child from her. (1App. Tab 1, p. 84 [prizing of male children]; 2App. Tab 19, pp. 207-208; Opp.App. pp. 159-160 [G.G. taking Nathan away from Kim];

(Continued on following page)

After those motions were denied, stepmother Amy brought an independent action asserting her maternity. The trial court dismissed the action. Pet. App. 4a. The Court of Appeal affirmed this ruling, as well. *Amy G.*, *supra*, Pet. App. 21a.

SUMMARY OF ARGUMENT

This Court does not have jurisdiction to consider this Petition because an adequate and independent state ground supports the decision of the California Court of Appeal. The Court of Appeal held that "where as here, a birth mother promptly comes forward to assert her legal maternity, and the child's father is undisputed and present in the action, the father's spouse cannot be the child's natural mother or the child's presumed mother." *Amy G.*, Pet. App. 16a. That decision is consistent with California Supreme Court precedent concerning parentage and with the California Family Code ("Family Code").

Even if this Court had jurisdiction, certiorari will be granted only for "compelling reasons," such as when "a state court ... has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(a). This Petition does not present

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Opp.App. pp. 152-154 [G.G. told Kim he was taking Nathan away for a period of time so Kim could get some rest]; 1App. Tab 1, p. 17; 2App. Tab 19, pp. 206-207 [G.G. brought a legal document to Kim, who signed it without understanding what it was].)

the requisite "compelling reasons" for review. The California Court of Appeal decision does not conflict with the decisions of other state or federal courts, or with the cases cited by Petitioners which were decided by this Court.

The relief sought by Petitioners would necessitate a monumental change in California family law, namely, breaking the connection between motherhood and conception, gestation and childbirth in cases not involving child abandonment, surrogacy or adoption. Under the Petitioners' revisionist statutory scheme, giving birth to a child would not be enough to guarantee parental rights to a mother who both actively and promptly seeks them. Redefining motherhood in this way would encourage removal of children from a birth mother's arms (as happened here) in the hope that extra-judicial placement of the child with a marital family would create the requisite "best interests" to mandate termination of a birth mother's rights. This result is not required by anything in the United States Constitution. As the California Supreme Court observed, "We simply do not in our society take children away from their mothers – married or otherwise – because a 'better' adoptive parent can be found." *Adoption of Kelsey S.*, 1 C.4th 816, 846 (1992). This maxim should hold true here, too, where the allegedly "better" choice is a stepmother. Surely a radical leap like this into a new legal world where biology is *never* destiny is a matter for the California legislature to undertake, and not this Court. *See Michael H. v. Gerald D.*, 491 U.S. 110, 129-130 (1989) ("It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted.").

The California Supreme Court declined to review the *Amy G.* case. There is no compelling reason for this Court to do so.

REASONS WHY THE PETITION SHOULD BE DENIED

I. This Court Does Not Have Jurisdiction Because Independent State Grounds Support the California Appellate Decision.

"This Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground." *Sochor v. Florida*, 504 U.S. 527, 533 (1992). The decision below rests on such a ground.

The California Court of Appeal construed California's Family Code to find that the trial court correctly barred a stepmother, Amy, from joining the biological mother, Kim's, parentage action and from pursuing her own parentage action, without the need to employ any presumptions, whether on a gender-neutral basis, or otherwise. The Court of Appeal held, "Under the[] circumstances [of this case], it is not appropriate to invoke a gender-neutral reading of the paternity presumptions to provide Nathan with another mother. To allow Amy an opportunity to be declared Nathan's mother through a gender-neutral reading of the UPA [Uniform Parentage Act] would arrive at an impracticable result." *Amy G., supra,* Pet. App. 13a, citing Family Code § 7650(a) (making provisions of UPA applicable to father-child relationship also applicable to action to determine existence of mother-child relationship only "insofar as practicable"). Thus, independent and

adequate state grounds exist for the decision and review by this Court is precluded.

Several provisions of California's Family Code were operative in this case and were correctly construed by the Court of Appeal. Petitioners significantly misstate California law in this regard. *See* Supreme Court Rule 15(2). They entirely omit from the Petition any citation to or discussion of Family Code § 7610(a), which provides that "[t]he parent and child relationship . . . Between a child and the natural mother . . . may be established by proof of her having given birth to the child[.]" This state statute establishes maternity, not just a presumption thereof. Petitioners disingenuously refer to an "uncodified" or "judicially create[d]" "pregnancy presumption." Petition, p. 9 ("state appellate court has carved out an irrebuttable 'pregnancy presumption' "); p. 13 ("California has adopted an uncodified, irrebuttable 'pregnancy presumption' as a substantive rule of law"); p. 14 (the California decision "judicially creates an irrebuttable presumption"), but that is not the case. Family Code § 7610(a) unambiguously governs this case, as the Court of Appeal correctly held.

Specifically, the Court of Appeal found that since there was no dispute Kim gave birth to Nathan, she was thus Nathan's mother under the state statute, Family Code § 7610, without any need to resort to presumptions. Pet. App. 10a-12a; 15a. Further, the appellate court noted that California law recognizes only one mother, except in lesbian relationships. *Amy G., supra,* Pet. App. 11a-13a, *citing Elisa B. v. Superior Court,* 37 Cal.4th 108, 119-120 (2005); *Johnson v. Calvert*, *supra*, 5 Cal.4th at 92, n.8.

The Court of Appeal accordingly determined that Amy's claim to be a "presumed" mother under Family

Code § 7611(a) and (d)[4] was unsupported by the Uniform Parentage Act (adopted in California as Family Code §§ 7600, *et seq.*), because the statutory scheme provides no mechanism for resolving the competing claims to maternity that would arise in these circumstances. California Family Code § 7612(b) directs the trial court to resolve conflicting presumptions arising *under* Family Code § 7611 using "considerations of policy and logic." However, in this case, there were no conflicting presumptions under section 7611. Rather, Kim's maternity was established (not just presumed) under section 7610(a), based on her having given birth to Nathan. No mechanism exists in the UPA for weighing conflicting maternity claims between a natural mother and a stepmother. The natural mother is the mother. *Amy G.*, *supra*, Pet. App. 11a-15a.[5]

The court explained that although Family Code § 7610(a) provides that the parent and child relationship may be proven by giving birth or "under this part," it is only in unusual circumstances that giving birth has not

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[4] Family Code §§ 7611(a) and (d), render a man a presumed father if (a) "[h]e and the child's natural mother are or have been married to each other and the child is born during the marriage," or (d) "[h]e receives the child into his home and openly holds out the child as his natural child." Thus, according to Amy, under a gender-interchangeable reading of section 7611, she is Nathan's presumed mother because she was married to Nathan's father and she took Nathan into her home and held him out as her child.

[5] On this point, Amy's reliance on *In re Jesusa V.*, 32 Cal.4th 588 (2004) is unavailing, as that case involved two competing claims for *paternity*, and *both* arose under Family Code § 7611 – that of the biological father, under section 7611(d), the "holding out" statute, and that of the mother's husband, under section 7611(a), by virtue of his marriage to the mother, and also under section 7611(d). Thus, unlike here, *In re Jesusa V.* was an appropriate case for the application of the presumption weighing statute, Family Code § 7612(b).

been found determinative. Pet. App. 12a-13a. One such unusual circumstance was a lesbian relationship in which both partners gave birth to children. In *Elisa B. v. Superior Court*, *supra*, 37 Cal.4th 108, the California Supreme Court found it appropriate to deem Elisa the "presumed mother" of the twins born to her partner during the relationship by applying the Family Code § 7611(d) "holding out" presumption, and thus to find her liable for child support after the couple separated. Critical to the court's analysis, however, were facts not present here: Elisa "actively participated in causing the children to be conceived with the understanding that she would raise the children as her own" and "there [were] no competing claims to her being the children's second parent." *Elisa B., supra,* 37 Cal. at 125. The court also noted the state policy in favor of a child having two parents rather than one. Here, in contrast, mother Kim *is* asserting a competing claim to be Nathan's parent, and Nathan cannot have *three* parents. *Johnson v. Calvert, supra,* 5 Cal.4th at 92 n.8. *Elisa B.* does not support the concept that stepmother Amy should be deemed the mother *instead of* biological mother Kim. Further, unlike Elisa, stepmother Amy played no part in causing Nathan to be conceived in the first place. In short, the court below found that *Elisa B.* is not controlling. Pet. App. 12a-13a.

In the other two cases Petitioners have identified in which courts have applied the presumptions of paternity in section 7611 to women, the birth mother was absent and no competing claim to maternity was being raised. The court below correctly found those cases to be distinguishable on their facts because the presumptions were applied to *determine* the mother, not to *usurp* the mother in favor of another claimant. *See Amy G., supra,* Pet. App.

13a, discussing *In re Karen C.*, 101 Cal.App.4th 932, 937-938 (2002) (birth mother gave child to another woman and absented herself; other woman took child into home and raised it as her own, and was presumed to be child's mother under Family Code § 7611(d)); and *In re Salvador M.*, 111 Cal.App.4th 1353, 1357-1358 (2003) (birth mother was deceased; child's adult half-sister who raised child was presumed to be mother under Family Code § 7611(d)).

Another case, which the Court of Appeal did not discuss but which is highly instructive here, involved a married couple and a surrogate alleging maternal rights. *In re Marriage of Moschetta*, 25 Cal.App.4th 1218 (1994). In *Moschetta*, a California appellate court refused to apply the paternity presumptions in the Uniform Parentage Act to determine which of two women, the surrogate or the wife who intended to raise the child, was the "mother." The husband in that case argued, like stepmother Amy here, that Family Code § 7611(d), the "holding out" provision, should be read in a gender-neutral way so that his wife, who received the child into their home and "held it out" as theirs, should be deemed the presumed mother. The court rejected this argument. Explaining that the function of the parentage law was to settle questions of *biological* parenthood, the court reasoned, "[A]ssuming for the sake of argument that the statutory presumption can be made gender interchangeable, the statutory presumption is inapplicable because of the absence of doubt as to the identity of the natural mother. There is no question of biological parenthood to settle." *Marriage of Moschetta, supra*, 25 Cal.App.4th at 1226. The same is true in this case. No one is disputing that Kim is the biological, gestational mother, or that she promptly asserted her rights.

Under California law, that is the end of the matter. Amy's argument that Kim should be deprived of the child to whom she gave birth is tantamount to asking that Kim be treated like a surrogate for Amy and G.G. The California decisions and statutes do not countenance such a radical result.

Turning back to the decision below, the court also rejected father and stepmother Amy's claim that because Family Code § 7650(a) mandates application of paternity rules to maternity actions "insofar as practicable," Nathan should conclusively be presumed a child of his father and stepmother's marriage under section 7540.[6] The appellate court noted that the father and stepmother's interpretation of section 7540 overlooked the statute's qualifying phrase "Except as provided in Section 7541." Family Code § 7540. Section 7541(a) overrides the presumption of paternity under section 7540 if blood tests reveal that the biological mother's husband is not the father of the child. If a court were to apply a gender-neutral reading of section 7540, it would also have to apply a gender-neutral reading of section 7541, which would negate a wife's conclusive presumption of maternity when blood tests reveal she is not the mother of the child. Here, however, no blood tests are required. It is undisputed that Kim, not stepmother Amy, is Nathan's biological mother. Accordingly, Amy simply cannot enjoy a conclusive presumption of maternity under Family Code § 7540. *Amy G.*, Pet. App. 15a.

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[6] Family Code § 7540 states "Except as provided in Section 7541 [providing for blood tests], the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be the child of the marriage."

Finally, the appellate court rejected stepmother Amy's absurd assertion that she was Nathan's "natural mother" and consequently must be made a party to Kim's action under Family Code § 7635(b). The court pointed out that section 7635(b) allows joinder of the "natural mother," but allows joinder of *both* "each man *presumed* to be the father" *and* "each man alleged to be the *natural* father." *Amy G., supra,* Pet. App.16a, emphasis in original. Given a commonsense reading, the Court of Appeal found that "natural mother" must mean the biological mother, because for fathers, "natural" and "presumed" fathers are separately enumerated. (*Id.*) The California Supreme Court's decision in *Johnson v. Calvert, supra*, 5 Cal.4th 84, supports this reading. In that case (which involved the competing claims of a genetic mother/wife and of a gestational surrogate) the California Supreme Court concluded that "the [Uniform Parentage] Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship" for purposes of determining "the natural mother under California law." 5 Cal.4th at 93. Kim satisfies both tests.

In summary, the California Court of Appeal's decision rested upon a careful, accurate application of existing California statutory and decisional law whose result would not have been changed by acceptance of Petitioners' equal protection claim. It follows that this Court does not have jurisdiction to review the decision below.

II. Because Stepmother Amy Is Not Similarly Situated to a Stepfather, No Equal Protection Violation Occurred Here.

Stepmother Amy argues that her equal protection rights were violated when the California Court of Appeal

refused to deem her a "presumed mother" under the "presumed father" statutes, which establish a presumption of *paternity* for a man who is married to the mother of a child and/or who takes a child into his home and openly holds himself out as the father. Family Code §§ 7611(a) & (d). Amy's theory, however, rests on the mistaken assumption that she is similarly situated to a stepfather. She is not.

We turn first to the legal requirements for establishing an equal protection claim. "For a gender-based classification to withstand equal protection scrutiny, it must be established 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are "substantially related to the achievement of those objectives.'" *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 60-61 (2001) (citations omitted).

Further, the person claiming discriminatory treatment must be similarly situated to others receiving favored treatment:

> [B]ecause the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require "'things which are different in fact . . . to be treated in law as though they were the same,'" this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.

Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981) (internal citations omitted) (holding that California's statutory rape law did not unlawfully discriminate on the basis of gender because men alone could be held criminally liable thereunder).

Kim was Nathan's one and only mother under Family Code § 7610(a), which, as previously explained, recognizes the simple fact that the person who gives birth to a child is the child's mother. This code section can only apply to women, and to argue otherwise would be absurd. This is so for the obvious reason that, as a matter of biological reality, only women can carry and give birth to a child. Thus, the statute reflects that the sexes are not similarly situated when it comes to the ability to give birth.

The statutory scheme provides a different method for establishing paternity because, again as a matter of biological reality, there is no obvious indicium of fatherhood akin to giving birth. Thus, the statutory scheme provides presumptions of *paternity* according to certain criteria. As noted, Family Code § 7540 provides, "[e]xcept as provided in Section 7541, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."[7] Further paternity presumptions relevant to this case, again as noted, are the section 7611(a) and (d) "child of the marriage" and "holding out" presumptions.

Stepmother Amy claims that, despite the obvious difference of sex, she is similarly situated to a stepfather. Thus, she argues, relying on *In re Jesusa V.*, 32 Cal.4th 588 (2004), she has an equal protection right to be deemed a "presumed mother" under these statutes. However, as the Court of Appeal aptly pointed out, Amy is not similarly situated to the man in *In re Jesusa V.*:

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[7] Family Code § 7541 sets forth the blood test mechanism for overcoming this presumption.

> Amy is not similarly situated to a nonbiological father, such as in *Jesusa V.*, who receives his wife's child into his home and holds the child out as his own. While a biological father's genetic contribution to his child may arise from nothing more than a fleeting encounter, the biological mother carries the child for the nine-month gestational period. Because of this inherent difference between men and women with respect to reproduction, the wife of a man who fathered a child with another woman is not similarly situated to a man whose wife was impregnated by another man. Therefore, it is appropriate for the Family Code to allow the birth mother's husband to claim presumed paternity when the biological father is present in the action, and not allow the wife of the biological father to do the same when the biological mother has promptly come forward to assert her parental rights.

Amy G., Pet. App. 18a.

In reaching this conclusion, the Court of Appeal relied on this Court's decision in *Tuan Anh Nguyen v. I.N.S.*, *supra*, 533 U.S. 53. In *Nguyen*, this Court held that there was no equal protection violation where a statute defining citizenship requirements for children born abroad and out of wedlock differed depending on whether the citizen parent was the mother or the father. Specifically, the statute imposed on citizen fathers but not on citizen mothers the duty to take one of three affirmative steps before the child turned 18: legitimation; a declaration of paternity under oath; or a court order of paternity. The Court stated that this requirement was substantially related to two important governmental interests: first, ensuring that a biological parent-child relationship existed; and second, determining that the child and the

citizen parent had a demonstrated opportunity to develop a relationship consisting of "real, everyday ties" providing a connection between the child and the citizen parent, and in turn, with the United States.

This Court's emphasis on the potential for a meaningful parent-child relationship inherent in biological motherhood as opposed to biological fatherhood deserves special focus. The *Nguyen* court explained:

> In the case of a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth, an event so often critical to our constitutional and statutory understandings of citizenship. The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship. [¶] The same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father. Given the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity.

Nguyen, 533 U.S. at 65. The Court further declared:

> To fail to acknowledge even our most basic biological differences – such as the fact that a mother must be present at birth but the father need not be – risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The

> distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Id. at 73.

This reasoning appropriately underlies the California Court of Appeal's decision here that denial of the paternity presumptions to stepmother Amy to counter Kim's undisputed biological maternity did not violate equal protection. As this Court has recognized, the process of conception, gestation and childbirth by its very nature creates the potential for a mother-child bond. In contrast, biological fatherhood alone does not necessarily engender that bond. Thus a stepmother attempting to displace a birth mother is not similarly situated to a stepfather asserting paternity rights as against a biological father. In this case, the process of gestation and childbirth – and a month of nursing and caring for baby Nathan – engendered not just the potential but the reality of a meaningful parental relationship between Kim and Nathan, and given that Kim is both present and promptly asserted her rights, nothing more needs to be determined concerning maternity. Resort to the *paternity* presumptions statutes would be nonsensical. In a scenario involving a stepfather, by contrast, the fact of biological fatherhood alone would not necessarily give rise to the potential for a meaningful relationship. Thus, the paternity presumption statutes make sense; they are appropriate to identify and sort out the biological *and* social factors which create the potential

for a meaningful relationship between the competing men and the child.

For these reasons, *Michael H. v. Gerald D., supra,* 491 U.S. 110, relied upon by Petitioners, is neither controlling nor persuasive. In *Michael H.*, this Court held that a biological father's due process rights were not violated where he was prohibited from challenging the conclusive presumption under the precursor to Family Code § 7541 that his daughter was a "child of the marriage" between the woman with whom he had an affair and the woman's husband. The Court relied for its conclusion on the policy of preserving the integrity of the marital family where a child has been living with its mother and her husband, who has treated the child as his own. However, the Court did not hold that the Constitution mandated the result sought by the Petitioners here. To the contrary, the Court concluded that whether or not a biological father should be allowed to rebut the conclusive "child of the marriage" presumption was a "question of legislative policy and not constitutional law."[8] 491 U.S. at 129-130. And since the identity of the mother was not at issue in *Michael H.*, that case does not conflict with the *Nguyen* case's rule, applicable here, that the fact of gestation and birth is enough to establish who is a child's mother.

This Court's decision in *Caban v. Mohammed*, 441 U.S. 380 (1979) does not support Petitioners' equal protection

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[8] Note that in response to the *Michael H.* decision, in August 1990 the California legislature amended former Cal. Evidence Code § 621(c), the precursor to Family Code § 7541(b), to enable a putative father like Michael, in addition to the husband or wife, to challenge the conclusive presumption through blood tests. *See* Miller, Baseline, *Bright-line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage*, 34 McGeorge L.Rev. 637, 688 and n.323 (2003).

argument either, as that case demonstrates the primacy of biological connection, by holding that for the purposes of preventing adoption, there is no difference between a father and a mother. This Court held that a statute allowing mothers, but not fathers, to withhold consent to adoption, "both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers." As California's high court noted some years later in discussing *Caban*, *Lehr v. Robertson*,[9] *Michael H, supra,* and other decisions, "Although the foregoing court decisions do not provide a comprehensive rule for all situations involving unwed fathers, one unifying and transcendent theme emerges. *The biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that biological connection into a full and enduring relationship." Adoption of Kelsey S., supra,* 1 C.4th at 838 (emphasis supplied).

Kim tenaciously sought the chance to develop her biological connection to her child into an enduring relationship.

In conclusion, Petitioners have not established that stepmother Amy met a threshold requirement for an equal protection claim based on gender discrimination – that as a stepmother attempting to challenge a present, rights-asserting gestational/birth mother's maternity, she was

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[9] In *Lehr v. Robertson*, 463 U.S. 248 (1983), this Court determined that because a putative father had never established a substantial relationship with his child, while the mother had continuous custodial responsibility for the child, the New York statute under which the putative father was not entitled to notice of the adoption proceedings unless he mailed a postcard to the putative father registry did not deny the putative father equal protection under the Fourteenth Amendment.

similarly situated to a stepfather attempting to assert paternal rights as against a biological father.[10] Thus, Petitioners' equal protection argument is meritless.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[10] Also, contrary to Petitioners' assertion (Petition, p. 4), the Court of Appeal decision does not conflict with this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000). In *Troxel*, this Court held that since parents have a Fourteenth Amendment fundamental right to make decisions concerning the care, custody and control of their children, a Washington state law that, as applied, allowed trial courts to grant nonparent visitation rights over a parent's objection unconstitutionally infringes on that right. The decision does not instruct who may be considered a parent.

Cal. Fam. Code § 7610 (West). Methods of establishment

The parent and child relationship may be established as follows:

(a) Between a child and the natural mother, it may be established by proof of her having given birth to the child, or under this part.

(b) Between a child and the natural father, it may be established under this part.

(c) Between a child and an adoptive parent, it may be established by proof of adoption.